IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

Nos. 341, 342, 705.

B. I. SALINGER, JR., *Appellant*,

vs.

VICTOR LOISEL, MARSHALL, *et al.*

RESPECTIVELY APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA AND CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE FIFTH CIRCUIT.

REPLY BRIEF.

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PREFATORY STATEMENT.

Respondent tells you in various ways that there is "but one substantial question" and that "all the rest is mere detail tending to confuse the real point." (13) That "real point" is asserted to be the action of the

Circuit Court of Appeals for the Second Circuit. For that action the respondent claims that it bars present consideration of whether appellant ought to be removed on a South Dakota indictment.

One amplification is the argument that "the cases at bar are three phases of an effort made by Salinger in the City of New Orleans to defeat the order of removal made upon the mandate which followed" the decision of said Circuit Court of Appeals. (2) Another amplification is that the removal proceedings in New Orleans, upon which the cases in this court rest, were in fact nothing but a continuation of the New York proceedings; that their basis was nothing but an order of removal issued in New York on the mandate of the Circuit Court of Appeals of the Second Circuit; that said order of removal was final and binding upon all courts and that, therefore, "it is difficult to see what question was open for consideration by the Louisiana Court." (13, 14.)

Still another amplification is that somehow the giving of two bail bonds and their forfeiture bar appellant from now resisting removal.

It is a fair claim to say that the brief for the respondent is practically confined to the presentation of these contentions.

We respectfully submit that so far from being the "one substantial question" in the case, the matters so strenuously urged present an immaterial question, and its presentation and not the real substance of the cases is what "tends to confuse the real point."

The "real points" are whether one may be removed to be tried in the District of South Dakota under an indictment which charges no offense other than a mailing done in the Northern District of Iowa; whether

such removal is warranted where the undisputed testimony is that the indictee was not in South Dakota at any material time—in a word whether the Constitution is suspended so far as appellant is concerned. Another such point is whether under a statute that commands prosecution to be had in the division where it is charged the offending took place, the accused may be removed for trial to a division in which it is not charged that any offense was committed; another, whether under a statute that commands prosecution to be had in a division wherein it is charged the offending was done unless the *defendant* obtains a transfer to another division, he may be removed for trial to such other division where the transfer was made on the application of the *Government;* another, whether there should be a removal upon an indictment which as to the gist of the offense—mailing in execution or attempted execution of the scheme alleged—sets forth letters which show on their face that when they were written and mailed the addressees had been already defrauded, if defrauded at all; and still another, whether there should be such a removal on an indictment which leaves out one essential element of the offense, intent to defraud, for in that while the alleged scheme is to cheat by obtaining money for shares of stock, there is no allegation as to the value of the shares nor claim that they were not worth all that was obtained for them.

The argument of the respondent recalls Sergeant Buzfuz with his dramatic emphasizing to the jury the awful crime of Mr. Pickwick in having written a note to Mrs. Bardell about chops and tomato sauce. The whole weight of this argument is addressed to a reiteration of the awful offense of having done precisely

what judges such as Mr. Justice Nelson and Mr. Justice Field say the law permits in aid of liberty. There is also reiteration of the immaterial fact that bail bonds were given and ordered forfeited. It would be just as strong an argument to assert that appellant may not have his Constitutional rights because he has dared to appeal to this court or because he did not give bail bonds when he might have done so.

What respondent asserts to be the only substantial question is a bottle of smoke. If the indictment charges an offense which is triable in the district and division wherein trial is sought, there is an end. In that case there must be a removal if appellant had never offended by making one successive application for the writ or offended by giving bail bonds. Per contra, if the demanding tribunal has no jurisdiction over the subject matter the applications in Louisiana add nothing to jurisdiction; neither is it added to by anything connected with the bail bonds. In a word, if there be no jurisdiction, nothing that appellant has done or can do can confer it. If that be not so, then as to one who was born without legs it might be claimed that something done by someone else worked it that the other at all times had two legs.

The writer had no part in this litigation until he presented the appeal to the Circuit Court of Appeals for the Fifth Circuit, but he finds it easy to reconstruct what occurred.

Judge Mack denied habeas corpus and ordered removal. Appeal might have been taken to this court, but through mistake in law was instead taken to the

Circuit Court of Appeals for the Second Circuit. It affirmed. It displays the attitude of being counsel for the Government. Three decisions of this Court, each directly in point on the vital phases of this litigation, were presented to that circuit court. Its opinion does not so much as mention either. The Government presented two Circuit decisions also in point. The appellant conceded the existence and the scope of these two decisions, but sought to avoid them by making argument tending to prove that both were opposed to the said decisions of this court; that neither of them mentioned those decisions; that one was, moreover, a bald dictum and the other based on a misapprehension of a statute and was as well utterly violative of reason and of the numerous decisions which declare indictment to be a part of a prosecution. The opinion of the Circuit Court of Appeals merely said it would follow these two Circuit decisions and made no mention whatever of the attempted avoidance. The same court had recently held that the mailing of the letters was still the gist of the offense. Its opinion does not mention that decision, and it affirmed a removal though the mailing was not done in the district to which removal was sought. It speaks of division lines as being but a matter of form. This, in the teeth of the Post case, 161 U. S., and other decisions that division lines are jurisdictionals.

In a word, the opinion shows on its face that there was no judicial consideration behind it. And the fact that appellant furnished an exhaustive argument is no proof that same was considered. The proof seems to be that none but appellant worked. Consistently with this lack of judicial quality, the court swept aside its own rules which gave fifteen days wherein to apply

for a rehearing by promptly issuing mandate practically at the moment when the opinion was filed. To be sure, certiorari might have been attempted; but evidently that was thought not to be as effective a proceeding as some other might be. At any rate, the time came when appellant must either submit to physical removal or give an appearance bond. Under this constructive duress, he did give such bond. It still remained true that the New York decision did not have much standing as a precedent, and, if not an adjudication, there was nothing wrong in attempting something that might bring either a fuller consideration or the opportunity to bring the matter before this court.

A surrender took place in New Orleans. That furnished the required custody essential to suing out a writ of habeas corpus. Much is said in condemnation of this procedure. It is urged that it is collusive. We have but to say that the well considered case of Grice 79 Fed. 627 squarely holds it to be lawful to make surrender to get the technical basis of custody and so obtain writ in order to test the constitutionality of a law.

Habeas corpus writs were obtained. At this point respondent argues that these habeas corpus proceedings really involved nothing but enforcing the New York order of removal. The ready answer is, and we will presently demonstrate, that this warrant could not have been the basis and that at any rate it was not the basis because the New Orleans proceedings were in terms based upon the South Dakota indictment. A hearing was had. It resulted in remand. The court allowed appeals to this court on condition that supersedeas bail bond be given. It was given. Despite

that, the court insisted that removal must take place. Respondent says that while this was perhaps unwarranted it should be excused because the judge was righteously angry at the fraud practiced upon him; to wit, concealing the existence of the New York proceedings at the time when the writs were applied for. The claim of deceit is tenuous. There could have been no intention to deceive. It was well known, of course, that when hearing should be had the South Dakota authorities would be informed of it, and in fact the District Attorney for South Dakota was present at the hearing and put the New York proceedings into the record. Those proceedings were not mentioned in the application because they were thought to be immaterial, not because there was either desire to conceal them or any hope that they would remain concealed.

The judge of the court who ordered the remand said nothing about New York proceedings or adjudication. It is true he made order recalling a writ and wording it as if one had not yet issued other than an alternative writ, and worded as if no hearing had ever taken place. The application was not for an alternative writ but for the usual writ, and order was made that it should issue as prayed. This perversion of the record exhibited in this order, therefore, was not due to any indignation because the New York proceedings were not mentioned in the application but were evidently the basis for the subsequent attempt to remove applicant despite his appeals to this court; for in cases where the application for the writ is denied appeal does not relieve from custody. If deference for the New York Court was profound, there was none for the jurisdiction of this court and its supersedeas. The claim that the application had been denied was for the purpose of keeping this appellant in custody on the the-

ory that this was a case where the writ had been refused, when in fact it had issued and hearing thereon had been had.

From this situation supersedeas from the Circuit Court of Appeals of the Fifth Circuit relieved appellant. And I may add in passing that he would not be guilty of any grave offense if despite the decision of the last named court he had attempted another application for the writ of habeas corpus.

When his hearing before that court came on he was physically present. He was entitled to remain at large pending decision in this court. He was entitled to remain at large pending the decision of said Circuit Court for there, too, he had been required to give and had given a supersedeas bail bond. The record shows that said court summarily ordered him imprisoned while present in court and the record attempts no explanation or justification of this unheardof proceeding.

While in the judicial frame of mind indicated by this proceeding, the court proceeded to its decision. When its opinion came, it justified the action of Judge Foster in attempting a removal while the appeals in this court were pending. It does it by manufacturing three warrants of removal when but one exists, and by holding that while the appeals here took care of two of the warrants it left matters wide open on the third one. It misapprehends a vital point by conceiving that it was asked to give appellate review to the decision in the Second Circuit. Of course no such review is involved. It declares it would be unseemly to pass upon what the court in the Second Circuit has passed. If that be so, judges like Nelson, Field and other Federal judges of high standing but too num-

erous to mention have been guilty of unseemly conduct; so have the judges of England and of British Columbia; and the courts of last resort in New York, Massachusetts, Maine, Wisconsin, Kentucky, Kansas, Oklahoma, Missouri, Minnesota, North Dakota.

The court emphasized its deference to the New York court by following its methods. It made no mention of the three cases in this court that were cited to it. It, too, cited nothing but the two Circuit Court cases without mention of the avoidances urged against them. It, too, ignored its own decisions. In the Whitehead case 245 Fed. at 388, it had ruled that under the statute as now amended the mailing was so completely the whole of the offense as that it was immaterial if the letter that had been mailed never reached the addressee. In spite of this and without mention of it, it found in the case before it that there should be a removal to be tried in South Dakota because of letters mailed in Sioux City.

The summation is that the case of appellant stands as if he had never obtained writ in New York. All that his conduct has worked is that two precedents have been created that would not have existed had he not made the successive application. Enough has been said to indicate why we claim that those precedents should not be followed in trampling upon the Constitution of the United States and the statute law thereof.

BRIEF OF THE ARGUMENT.

I.

THE CLAIM THAT DIRECT APPEAL TO THIS COURT DOES NOT LIE.

This claim is based on the argument that nothing but the jurisdiction of the South Dakota court is involved and that the naked lack of jurisdiction will not base a direct appeal to this court. The answer is that here is more than a naked claim that jurisdiction is lacking. The claim is that jurisdiction is lacking because of constitutional provisions. In other words, appeal here lies because the applicability of the Constitution is involved. See Pereless, 157 Fed. 419; Greene, 53 Fed. 106, 107; Fries 284 Fed. at 827; Tillinghast, 225 Fed. at 832.

This question of the applicability of the Constitution bases the direct appeal. Horner, 243 U. S. 247; Spreckles, 192 U. S. 397; Alaska Fishery Co., case 39, Sup. Ct. 208, 210.

Cases identical in all except in the name of the courts below and the name of the litigants have been entertained here. That is to say, there was remand below and appeal here. See Tinsley, 205 U. S. 20; Greene, 183 U. S. 249; Benson, 198 U. S. 1; Beavers, 194 U. S. 703; Brown vs. Elliott, 225 U. S. 392.

The point was squarely raised. See Par. 6, p. 2—341; Par. 4, p. 55—341; Par. 11, p. 79—341; Par. 2, p. 95—341; Par. E., p. 3—342; Par. 11, p. 83—342.

There is also jurisdiction here because the point is raised that if Section 215, Penal Code, is construed to permit trial in South Dakota it violates the constitution. And it is familiar doctrine that such point gives this court jurisdiction to entertain direct appeal.

And so does any violation of constitutional guarantees: Ex Parte Nielson, 124 U. S. 309; 131 U. S. 176.

One constitutional question raised is whether the indictment is not so prolix as to violate the guarantee of the Constitution that accused is "to be informed of the nature and cause of the accusation." (For example, see par. 16, p. 101—342.)

A constitutional question is also raised by the fact that removal was ordered although it was the undisputed testimony that none of the indictees were in the District of South Dakota at any material time.

II.

AS TO THE STEVER CASE, CONSTITUTING STARE DECISIS.

The indictments are identical. The Stever decision states that the final sole claim for venue in the district where delivery was made, is that there "defendants caused the letter mentioned to be delivered by mail to the person addressed."

It is true the amendment was not effective so far as Stever was concerned. But its very words were the reliance of the Government in the Stever case, as they are in the case at bar. In his brief respondent says that "the very words upon which this indictment is based" are "causing to be delivered." (30).

Those words as said were in the Stever case. They are in the indictment at bar. They were relied on in both cases. The amendment has those words. The Government contended that they were in the original statute, in substance. They *are* there in effect. For the original prohibits the devisors of schemes from mailing letters in aid of that scheme. When they mail them they cause delivery. When they deposit a letter

in aid of a fraudulent scheme devised by them, of course they act "knowingly." All this being so, this court was asked to decide and did decide what effect "knowingly causing delivery" had upon venue.

It is worthy of note that through the entire course of the opinion in the Stever case, nor anywhere in the briefs in it, is there a suggestion that it is of importance that the amendment is not effective as to Stever. The entire trial theory is that the amendment was in substance in the original and that the effect of this was for decision. The holding that the lottery statute cannot be borrowed for the Stever case does not refer to the words in that statute "causing to be delivered," but to the elective venue provision in that statute.

The Government contended in the Stever case that the amendment had made no change so far as venue was concerned. The judicial construction is that the amendment worked a change in substance. That being so, it does not work alteration in the place of trial because venue provisions are matters of procedure and not of substance. It is obvious that the object of the amendment was to reach a new class of offenders rather than to create a new class of offense. The word "knowingly" proves that. As already said, those who devise schemes were covered by the original. The amendment sought to reach those who had not participated in devising the scheme but who might, to be sure act innocently, and also might act "knowingly" in helping in the use of the mails to aid a scheme devised by others than themselves. See Foster, 178 Fed. 171.

The Stever decision had the right to consider the words of the amendment which were also in the indictment before them, if for no other reason than that it is never a *dictum* to construe statutes in *pari materia* (36 Cyc. 1144, 1146; Mitchell, 98 Va. 459; Crawfordsville, 104 Ind. 97; Gilbert, 67 Kans. 346; 25 R.C.L. (Statutes) 285).

III.

WHAT THE STEVER CASE, 222 U. S. 167, EXPRESSLY RULES WOULD BE THE LAW IF THERE WERE NO SUCH DECISION AND THE CASE HERE WAS ONE OF FIRST IMPRESSION.

This is so for the following reasons among others:

It is settled that a prohibition of "knowingly causing to be delivered" is a prohibition against starting machinery. Mailing the letter is the only starting delivery that this defendant could do. He mailed in Sioux City, therefore he caused delivery in Sioux City and South Dakota has no jurisdiction.

Congress has construed that "causing" does not create elective venue because when using "causing to be delivered" and the like, it has invariably added an express provision for elective venue.

It is the universal interpretation that causing does not give such venue because all but one case in a hundred have been instituted in the district of mailing. The same result is reached by the universal current of decision since "causing to be delivered" was added to the statute—that the mailing still remains the gist of the offense.

IV.

THE UNCONTRADICTED TESTIMONY THAT ACCUSED WAS NEVER IN SOUTH DAKOTA AT ANY MATERIAL TIME AND THE LINE OF DECISION ABOVE REFERRED TO ARE NOT OBVIATED BY THE CONTINUOUS OFFENSE STATUTE. SECTION 731. THIS IS SO BECAUSE

> Mailing being the completed offense and the only "causing of delivery" that is possible there can be no room for Section 731 because an act completed in one district can not be further completed in another.
>
> The Circuit Court of Appeals in the Fifth Circuit ruled in the case of Whitehead, 245 Fed. at 388 that a violation of Section 215 as now amended is complete when the letter is mailed with the proper address and stamp, even if it never reaches the addressee.

This court has covered this point by a line of express decisions. (Original brief, 52 and 52, bottom.)

If Section 731 applied, the Stever case could not have been decided as it was.

This court has held that for practical purposes as to jurisdiction, it will not do to say that with few exceptions every crime has continuity.

There should be no confusion between a completed act and the injurious consequences of an injurious act. If a seduction be completed in one state prosecution must be had there and can not be had in another where the birth occurs.

Cases like that of *Palliser* have no application. In the first place they are not misuse of the mails cases and therefore do not run counter to the express de-

cision that mailing is not a continuous offense. The *Palliser* case but rules, and rightly, that where the accusation is an attempt to bribe the mere mailing of the letter offering the bribe is not a completed offense; that it is not completed until the addressee is, by means of delivery, advised that it is sought to bribe him. That has no bearing on whether the offense of using the mails in aid of a fraudulent scheme is or is not completed when the mailing is completed.

V.

THERE SHOULD BE NO REMOVAL WHERE THE INDICTMENT OMITS ANY ESSENTIALS OF THE OFFENSE.

That is Hornbook law. That question can never be relegated to the trial court. In this case one essential element is omitted, to wit: the value of the shares. The scheme alleged is to obtain money for those shares by false promises, representation, etc. It is Hornbook law that intent to defraud is essential. A failure to say anything about the value of the shares or to assert that they were not worth as much as was obtained for them leaves out the vital element of intent to defraud. See Hess, 142 U. S. 483; and pp. 104, 105 Original Brief. See also United States vs. Johnston, 292 Fed. 491. (A removal case.)

VI.

RESPONDENT DOES NOTHING WITH DIVISION JURISDICTION NOR WITH THE QUESTION OF WHETHER THE LETTERS ARE AN EXECUTION OR ATTEMPTED EXECUTION OF THE SCHEME ALLEGED.

Not a word is said about the Post case or Paul vs. Virginia. Not a word about Section 53, Judicial Code. Not a word about transfer on the application of the Government.

Not a word has been said either in oral argument or in brief as to the fact that the letters said to be in execution or attempted execution of the alleged scheme show on their face that they are addressed to those who had already been defrauded, if ever defrauded.

VII.

NO ADJUDICATION IS PLEADED AND THE PLEA WOULD BE UNTENABLE IF MADE. WHERE A HABEAS CORPUS PROCEEDING ENDS IN A REMAND THERE IS NO ADJUDICATION AND NO BAR TO HAVING SUCCESSIVE APPLICATIONS HEARD.

That such applications are entitled to be heard independently of the decisions in former applications, is settled in the Law of England, and that law rules in the Federal courts. See Ex Parte Kaine per Justice Nelson. (See pp. 15, 16, brief in 705.) In that case the first application had been denied, and the claim was made that the first decision was final because it had been made by Judge Betts sitting in the Circuit Court and that same was a court of competent jurisdiction to hear and determine whether the commit-

ment order or warrant was legal or not. (P. 15, brief in 705.) Justice Nelson held against this contention.

In Ex Parte Cuddy, per Justice Field, 40 Fed. at 65, 66, it is said:

"The writ of habeas corpus it is true is the writ of freedom and is so highly esteemed that by the common law of England applications can be made for its issue by one illegally restrained of his liberty to every justice in the Kingdom having the right to grant such writ. No appeal or writ of error was allowed from a judgment refusing a writ of habeas corpus; nor, indeed, could there have been any occasion for such an appeal or writ of error, as a renewed application could be made to every other justice of the realm. The doctrine of res adjudicata was not held applicable to a decision of one court or justice thereon; the entire judicial power of the country could thus be exhausted." Ex Parte Kaine, 3rd Blatchf. 5, and cases there cited.

The same doctrine formerly prevailed in the several states of the Union, and, in the absence of statutory provisions there the doctrine prevails now. In many instances great abuses have attended this privilege which have led some of the states to legislate on the subject. And, in the absence of such legislation, while the doctrine of res adjudicata does not apply, it is held that the officers before whom the second application is made may take into consideration the fact that a previous application has been made to other officers and refused; and in some instances that fact may justify a refusal of the second. The action of the court or justice on the second application will naturally be affected to some degree by the character of court or officer to whom the first application was made and the fullness of the consideration given to it. I hardly think that an ordinary justice would feel like disregarding and setting aside the judgment of a magistrate like Chief Justice Marshall or Chief Justice

Taney, who had refused an application for a writ after full consideration."

The fair analysis of the foregoing is that the most which the first decision can accomplish is the creation of a precedent which might be highly persuasive or otherwise according to the standing of the decider and the character of the decision. Next, it served notice on Congress as early as August 13, 1889, that if the possible abuses were not to continue it was up to Congress to enact some statute law. It is within reasonable bounds to say that the decisions by Mr. Justice Nelson and Mr. Justice Field and the other cases we have cited have higher standing here than the decision in the Fifth Circuit, that the first decision is final. Surely, neither the decision in the Second or in the Fifth Circuit are persuasive precedents. This is emphasized by the fact that what these two first named decisions hold has been followed in Carter's case, 105 Fed. 614; in the case of Kopel, 148 Fed. 505, and by the courts of last resort in Maine, Massachusetts, Minnesota, Missouri, New York, North Dakota and Kentucky—to say nothing of the decisions in England and the one in British Columbia. We have many cases of this character in our brief in 705. (See pp. 15-23.) Many of them supplement the notice given Congress which is found in the Cuddy case. They declare that if a change is to be made it must be done by statute. In the case of Kopel, 148 Fed. 506; decided October 10, 1906, attention is called to the fact that no Federal statute has been passed limiting the common law right to successively petition every judge having authority "without regard to the fate of the successive applications," wherefore the court considered itself bound

"to dispose of the matter as an original application." And Congress has enacted no statute.

Speaking to such a situation Judge Bingham pertinently said in the Graves case, 270 Fed. at 187, "and until Congress takes such action (stopping the abuse of appeals in habeas corpus cases) the court should enforce the statutes as they stand without undertaking to limit them by judicial construction."

As to the materiality of the right to appeals and as to the finality of decisions in the Circuit Court of Appeals. Both questions are involved in the Carter case heard before Thayer and Hook, Judges. In that case Carter had gone into this very Second Circuit. Being remanded, he appealed to the Circuit Court of Appeals of that Circuit. The decision below being there affirmed, he sought review here by certiorari, and the aplication was denied. He went beyond that and took an appeal here, which appeal was dismissed on the ground there could not be an independent appeal both in the Circuit Court of Appeals and in this court (105 Fed. at 616).

Certainly this settles that what occurred in the Second Circuit was no bar to the application made in the Eighth Circuit. And the holding is that the denial of the writ by the Federal courts of one circuit does not render the questions determined res adjudicata so as to preclude for reexamination by courts of another circuit of subsequent habeas corpus proceedings instituted therein by the same petitioner. (105 Fed. at 614.) It settles also that the right to appeal does not destroy the right to independent consideration on successive applications. For in the Carter case the right to appeal existed and, not only that, but it was exercised by going to the Circuit Court

of Appeals for the Second Circuit. That very question arose in the case of Bowack and was decided there squarely (2 B. C. at 223, 224). It was held that though the right of appeal was given that was not an exclusion, and that Bowack was still entitled to use the common law right of having successive applications independently heard. (See page 22 brief in 705.)

We believe no case that counters those we have cited exists. The Government asserts but one and that is the case of Watkins in 3rd Peters 193. An examination of that case shows that it is irrelevant to the point now in consideration. About all that makes it relevant is that it is a decision in a habeas corpus application. There were no successive applications and consequently the case does not deal with the effect of the first decision. What the Watkins case is is just this: Watkins was under conviction in a Federal court. He applied to this court for habeas corpus. The writ was denied because it was rightly held that since this court could not review the conviction by appeal or writ of error it should not do so by habeas corpus since the conviction was the action of a competent court, and since the English law expressly excepted such convictions from being dealt with in habeas corpus.

Indeed respondent make no serious attempt to meet this overwhelming array of case law. The most that is said in addition to citing the *Watkins* case is found on page 15 of his brief and is, that as to the claim that a discharge in habeas corpus is not res adjudicata so as to prevent another application for the writ, that "in a general way this may be true." At this point nothing is added except the immaterial statement that

the fundamental principle of res adjudicata applies in criminal cases, which is irrelevant because habeas corpus is a civil case—see the Graves case 278 Fed. There is the further immaterial statement that a *discharge* in habeas corpus may operate as res adjudicata. Of course it may. But the distinction on this head between a discharge and a remand is elementary. And then there is the further statement that though there may not be res adjudicata here, yet the action in the Second Circuit should operate "as the law of the case." This is making a distinction by giving the same thing two names. The rule that the remand does not constitute res adjudicata would mean little if a remand barred successive applications merely by being called "law of the case."

It may well be added here that respondent concedes that remands in habeas corpus will not prevent the accused from setting up in the trial court the very points decided by the remand. The opinion in the Fifth Circuit so says. It is obvious therefore that the remand can not be treated as an adjudication, for an adjudication bars a reassertion in any and all courts including the South Dakota court in which this indictment was returned. Wherefore, a concession that those points may be again raised in South Dakota is a confession that the action of the courts in the Second and Fifth Circuits are not an adjudication. This explains the case law and gives it the support of reason. It is not a question whether the court that decided the first application is one whose judgments are ordinarily final, not a question of the court but of the nature of the litigation. That is interlocutory, not final. From top to bottom it is just the action of a committing magistrate. Tinsley 205 U. S. 20; Blaf-

fer (C.C.A.) 160 Fed. 389; Howe 9 Mo. 690; Ex Parte Johnson (Okla.) 98 Pac. at 464; Snyder 17 Kan. 552; Clarke (Mo.) 106 S. W. at 996; Ex Parte Johnson (Okla.) 98 Pac. at 465; Pratt 279 Fed. at 265; Henry 123 U. S. 373.

It is not the ordinary case or cause, because in it the pleading of the plaintiff, the indictment, is admissible in evidence. Certainly it is not admissible in any case in which the decision constitutes res adjudicata.

It is not a proceeding in a suit but a summary application. Cox 15 App. (CAS.) at 514, 515; Ex Parte Johnson (Okla.) 98 Pac. at 465.

It will hardly be contended a remand would in suit on bail bond be available as an estoppel by point litigated. This, because the proceeding is summary and interlocutory. On the other hand, were it held in suit on one bond, never so erroneously, that this indictment is valid, that would be such estoppel. This, because action on the bond constitutes a cause or suit.

Think of what it would mean if a remand ordering trail where there is no jurisdiction of the subject matter were treated as a finality against repetition. When it is clear the trial to be had must be a farce, is it not far better to permit the taking a second chance to prevent such a farce by stopping it summarily than to wait and nullify the farce.

Another objection to the assertion of res adjudicata is, first that the parties are not identical. (See the

case of Bradley 153 Mass. where that question is touched upon but not decided.)

Neither is there identity of issues. First, because in New York the conclusion of the indictment that an offense was committed in South Dakota was not met by testimony. In Louisiana it was met by undisputed testimony that accused was never in South Dakota at any material time. Next, the assignment of errors presented in New York does not raise the constitutional question that the indictment is in such condition as that it violates the constitutional requirement that the accused shall be advised of the nature of the offense with which he is charged. (See 81 to 85-342.)

Why should there be the circuity of action that would result if this court declines to pass upon the merits on some theory like that of—say, adjudication. What useful purpose would be served? It is conceded these substantial points may be raised in the trial court. It is practically conceded that its decision is reviewable here on direct appeal. If the court thinks there is no jurisdication in South Dakota, why not say so now. Why subject to a trial in a court that has no jurisdiction in order to decide after conviction what may now as effectively prevent a conviction as would a reversal of it. Why subject to the hardship of a removal to a distant place and to trial among strangers. Concede the court that is without jurisdiction will be fair. Surely the same presumption must be indulged for courts that do possess jurisdiction.

VIII.

THERE IS NO ABUSE OF PROCESS BECAUSE ONE SUCCESSIVE APPLICATION WAS MADE.

To begin with this is an affirmative defense and it is not pleaded. Passing that, if there be the right to make successive application, it cannot be a wrong to make just one. If that be a wrong, then the rule permits, but a single use of the permission cancels the permission. The authorities make clear that it would do more harm to deny successive writs than is ever done by any possible use of them. See the case of Snell 31 Minn. 110; Graves 270 Fed. 187; and see page 32 of brief in 705).

Whether that would make any difference or not, here, is no case of persistent application for successive writs. There was but one such application. As respondent says all done in New Orleans was just three phases in the one proceeding. There is no occasion for the fear that the decision of this court on the merits might also be disregarded and another application made. The right to successive writs has the exception that application is not to be made against the "holding of a court of superior jurisdiction." Clarke (Mo.) 106 S. W. at 996. It would be idle to apply to another court after this court had sustained removal, for appeal here would undo all that, and no court would grant the writ against such holding by this court.

IX.

THE THEORY THAT THE PROCEEDINGS IN LOUISIANA WERE BUT A CONTINUATION OF THOSE IN NEW YORK AND BASED ON THE WARRANT OF ISSUE OF REMOVAL IN NEW YORK, IS UNTENABLE AND IS NOT SUSTAINED BY THE RECORD.

FIRST.—The appearance bond given in New York in lieu of removal ended the warrant of removal. After that it ceased to function anywhere.

Second.—A warrant of removal in one district cannot be the basis of removal proceedings in another. The basis must be either indictment, bench warrant or complaint.

Third.—Under the rule that what is enumerated excludes that which is not enumerated, the Louisiana proceedings are not based on the New York warrant. The return of the respondent shows affirmatively that the detention was upon commitment and other orders made by the Louisiana Commissioner and the judge of the Louisiana District Court. (pp. 1, 5-341; pp. 1, 6-342; pp. 9, 10, 14-705.)

Assuming for the sake of present argument that the Louisiana proceedings could be based upon the proceedings that had been had in New York, it is a conclusive answer that they were not so based. After the authorities in South Dakota were advised of the surrender, a bench warrant was moved in the South Dakota District Court and one issued on the 4th of April. (pp. 90, 91, 92-342.) Return was made on the same day that this appellant was not found within this district. (p. 93-342.) Two days later an Assistant District Attorney made complaint under Section 1014.

It was on this complaint that the Commissioner had a hearing and held appellant for removal. And the complaint is in terms based upon this single indictment in the District of South Dakota. (pp. 100, 101-342.)

Finally—this all is but a repetition of the res judicata argument—but a way of saying that the action of the New York Court bars successive application. In all the cases that present such application a removal had been ordered in the earlier application. That is why the later application was made.

X.

THERE WAS SUFFICIENT CUSTODY TO BASE HABEAS CORPUS.

Some claim is made that this is not so in case 341. The basis for the claim is that the return is not traversed. It asserts that the surrender was voluntary and urged by the accused against the argument of the deputy marshal, and that after the voluntary surrender there was in fact nothing but a short and nominal custody. Let us assume that the return does make this claim and that if nothing more subsisted the assertion would stand because no traversed. The trouble is traverse is unnecessary. The Government put the deputy marshal on the witness stand. He said nothing about any voluntary surrender or argument about it. He deposed that there was actual custody and that it was not relieved from until the deputy satisfied himself that writ of habeas corpus had issued and that appearance bond therein had been given as required by the judge. He added that there would

have been custody without the surrender upon advices received from South Dakota. (pp. 43, 44-341.)

But suppose there was not such custody in 341 as will base the application. There are three cases here. Each presents the same substantial questions. If there was sufficient custody in either of the three, the basis for habeas corpus is furnished. Appellant does not need a decision in each and all of the three cases before this court. Now, as to case 342, there is no pretense that there was not actual custody. Appellant was taken into custody upon a final mittimus after hearing was had by the Commissioner on complaint filed under 1014. (pp. 94, 95-342.) The return admits there was actual custody. (pp. 1, 6-342). The respondent admits actual arrest and custody. (p. 7.) Of course it cannot be claimed there was not actual custody in 705. There, it continued until relieved against by the supersedeas of the Circuit Court of Appeals.

XI.

NEITHER THE GIVING OF BAIL BONDS, NOR THEIR FORFEITURE, NOR ANYTHING ELSE THAT APPELLANT COULD DO OR FAIL TO DO, CAN GIVE JURISDICTION TO THE DISTRICT OF SOUTH DAKOTA IF IT LACKS IT.

Respondent admits that if jurisdiction is lacking and therefore the indictment is an absolute nullity, the bail bond would be a nullity and could not of course effect a waiver. But at this point respondent reasons in a circle and says the indictment is not void because the New York courts held that it was a proper basis for a removal. If that is not an

adjudication, the indictment is now before this court. Assuming that there was no jurisdiction in South Dakota, the bonds given are waste paper (original brief in 705—33, 34).

Without any exhaustive discussion of the case of Peckman 143 Fed. 625, it suffices to say that in that case no jurisdictional question is involved. It therefore is not a holding that lack of jurisdiction can be waived. Speaking to that elementary proposition, we have but to say that giving of bonds, causing them to be forfeited or anything else appellant could have done, will not avail to bar him. He could not give South Dakota jurisdiction by the most solemn and express consent. In the case of Conner 111, Fed. 734, it was ruled:

> "There can be no order of removal upon consent of the party whose removal is sought where the facts charged in the indictment do not constitute a claim."

The objection that there is no jurisdiction of the offense "cannot be waived and may be taken at any time." 16 Corpus Juris 184; Gilmer 129 U. S. 315. In the case of the Indians decided by Judge Dillon on Circuit (27 Fed. Cas. 923), he discharged because the court had no jurisdiction although the accused expressly waived motion in arrest of judgment and asked to be sentenced.

If express consent can not give the necessary jurisdiction certainly it can not be given by estoppel or implication.

XII.

Respondent says nothing about division line jurisdiction (see original brief in 341—34-59-63). Nor about transfer on application of the Government (original brief in 341—81-85). Nor about the letters not being acts in execution of the scheme (original brief 341, 342—86-102).

Respectfully submitted,

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On Brief.

341, 342, 705.

ADDENDUM.

(This was omitted through oversight in sending copy to printer.)

I.

The undisputed testimony that accused was at no material time in South Dakota, and the continuous offense statute.—Hence discharge for want of probable cause. Pereless, 157 Fed. at 421, orig. brief, 50.

(a) There is no conspiracy count.

(b) The mailing of a letter is not a continuous offense—*Palliser's* case is not relevant. Mailing gets into it only as being the first step in an attempt to bribe. Of course in such a case the mailing did not complete that offense. That has no bearing on the question whether mailing in violation of Section 215 (mailing being the gist of the offense) is completed when the mailing is done. That it is the gist of the offense is universally held. (Original brief, 52.)

In the *Whitehead* case (5th Circuit), 245 Fed. at 388, it is ruled that the mailing so utterly completes the offense that it is immaterial that the letter never reaches the addressee.

It has been expressly decided in this court and elsewhere that mailing is not a continuous offense. (Original brief, 52, 53.) It is legislative construction that it does not constitute such offense. (Original brief, 57.) It is the inevitable implication in the Stever case that mailing is not a continuous offense. It is settled that an offense is not the less completed because its injurious consequences occur elsewhere and later. (Orig. Brief, 53-54.)

II.

Causing delivery-venue.

Mailing is not a continuous offense. First, because the mailing itself completed the offense. Second, because the thing prohibited is not delivery but causing delivery. This use of "causing" as a verb is merely the starting of the machinery that brings about delivery. (Original brief, 31.) Third, the only causing one not an employee of the establishment can do is mailing, and as the indictment here charges the mailing to have been done in Iowa there is no jurisdiction in South Dakota. This, because the only act of causation was done and completed in Iowa. As well say that under a statute punishing the firing of a shot with intent to kill, prosecution will lie in a district where no shot is fired.

Nothing in the cases cited by the respondent in the least affect all this. There are three for which it is claimed that by implication at least they give venue to South Dakota. Two of them, Brown vs. Elliott, 225 U. S. 392, and Hyde vs. United States, 225 at 347, are conspiracy cases, and the point ruled is that physical absence of some conspirator is immaterial so long as a partner in the conspiracy committed an overt act within a district wherein an indictment is returned. (Here is no charge of conspiracy.) The third is Benson vs. Henkel, 198 U. S. 7, wherein it is said:

> "We have had frequent occasion to hold generally that technical objections should not be considered and that the legal sufficiency of the indictment is only to be determined by the court in which it is found. Indeed it is scarcely seeming for a committing magistrate to examine closely into the

validity of an indictment found in a Federal Court of another district and such to be passed upon by such court on demurrer or otherwise. Of course this rule has its limitations. If the indictment were * * * one that obviously upon inspection set forth no crime against the United States * * * or if such crime be charged to have been committed in another district from that to which the extradition is sought,—the Commissioner could not properly consider it as ground for removal. In such case other evidence must be had as to probable cause."

III.

The Stallings case 253 U. S.

It holds just three things. First, that the bond given in Stallings case was absolutely voluntary. Second, that an appeal testing the right to remove is under such circumstances moot. Third, that being under bail is not the custody which will base an application for habeas corpus. All this is made clear not only by what the decision says but by its citations.

That the bond in the *Stallings* case was absolutely voluntary is fully pointed out on pp. 340, 341, 343 of the report of its decision. That in the case at bar the bond was not given voluntarily is demonstrated by the fact that it was conceded it was given "in lieu and substitution for his removal by the marshal." (Pp. 8-342.)

Of course an involuntarily given bond to appear in a court that has no jurisdiction cannot be a waiver of anything. Such a bond is a piece of waste paper. (Original brief, 705, 36, 40.)

In the Stallings case no question of venue jurisdiction is involved. Its next holding is that where a bond is given voluntarily a test of the right to remove is a

moot question. (Report of Stallings Decision, pp. 343, 344, and the citation of Moy, 113 U. S. 216; Baez, 177 U. S. 378.)

The last point of the Stallings decision is that one who is under bond is not in such custody as that it will base habeas corpus. That is made plain by what is said and also by the citations. Those citations are State vs. Buyck, 1 Brev. 460 (S. C.); Arnold, 3rd Yeates (Pa.), 6, Martin, 569 (La.); Troutman, 24 N. J. L. 634, Silbray, (CCA) 185 Fed. 401.

There is no question in the case at bar about actual custody in at least two of the cases before this court. (P. 26 Reply.)

At any rate, there is no plea of waiver.

IV.

The Peckham case, 143 Fed. 625.

It seems to have very little to do with the controversy at bar, even if it were to be followed in a holding that jurisdiction could be waived by giving a bail bond —in which connection it should be said that no waiver is pleaded; and there is no venue jurisdiction in the case.

Its main argument that bail giving could cause delay. Successive writs being permitted, one in custody could cause just as much delay. Again, as abuse of the writ is not pleaded, there was no chance to explain, including the giving of bond by the company who had surrendered.

In the *Peckham* case an examination before the magistrate proceeded for a time. Peckham concluded to waive examination and the proceeding before the Commissioner stopped with the giving of an appearance bond on the part of Peckham. It will be noticed that the bond was given voluntarily. When given, the voluntary act of Peckham brought about a situation under which it could not be told whether removal would ever have been ordered had he not waived the examination. No question of jurisdiction as to the place where the alleged offense was triable is raised or considered in this case. Neither are successive applications for habeas corpus mooted in any way because there never were any such applications. The crucial question, as stated by the trial judge, is whether one may have the first writ of habeas corpus after he has "voluntarily surrendered himself to the sheriff," and the decision is that he is not under those circumstances entitled to that writ. The case has so little to do with what will waive the right to successive applications, that, as it points out as an argument against Peckham, instead of testing the action of the committing magistrate by habeas corpus, he permitted that action to become a finality by failure to sue out a habeas corpus. Any examination of the Peckham case demonstrates that it amounts to just this, even if it were to be followed:

Where one voluntarily gives a bond and is afterward surrendered by his sureties, he can not hark back to where he stood before he gave bond and demand a new examination by a committing magistrate to supplement the one had in the first place, and which was left uncompleted by a voluntary waiver of further examination.

It should be said, too, that in the Peckham case the Commissioner acted in New York, the bond was given in New York, the surrender was made in New York, and the attempt to get a new preliminary examination was made in that state. If by any stretch of the imagination the Peckham case is applicable anywhere it would be if this appellant had sought to do in New York what Peckham attempted to do there. The surrender at bar was outside the jurisdiction of New York. If it be granted for the sake of argument that he could not test the commitment upon that surrender because he had given the bond under which surrender was made, still nothing stands in the way of testing his detention under an independent removal proceeding brought after commitment on the surrender by means of an information lodged by the Government, not because of anything that had happened in New York, but because after exoneration of the bond through surrender, the Dakota court ordered a forfeiture and issued a new bench warrant.

In fewer words, appellant has brought before this court three cases and, beyond all argument, the detention complained of in two out of the three is actual custody and not detention by reason of the surrender.

Respectfully submitted,

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